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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 685

PEOPLE OF THE STATE OF ILLINOIS, EX. REL. MAURICE GOLDSTEIN, ALIAS MAURICE GOLD and JACK S. GUTHMAN,

Petitioners,

vs.

JOHN E. BABB, Sheriff of Cook County, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

This Court Is Without Jurisdiction to Consider the Question Presented for Review.

The petition is fatally defective in that it does not specify the stage of the proceeding in the court of first instance, and in the appellate court, at which the Federal question sought to be reviewed was raised, the method of raising it or the way in which it was passed upon by the court.

The reason the petition does not comply with this court's Rule 23(f) is that the question presented (Petitioners' Petition, p. 2) "Whether Chapter 60, Section 2, Ill. Rev. Stat. 1951, known as the Fugitives From Justice Act, is repugnant to Article IV, Sec. II, Clause II of the Constitution of the United States", is raised for the first time in this

court. It was not raised in the criminal court of Cook County, the court in which these proceedings originated. It was not raised in the Supreme Court of Illinois upon petitioners' writ of error in that court. It was not raised in petitioners' petition for rehearing in the Supreme Court of Illinois.

Because the question was not raised it was not passed upon by the Illinois courts. This court is without jurisdiction to review the constitutional claim now made (*Edelman* v. *California*, 344 U. S. 357; *Foster* v. *Illinois*, 332 U. S. 134, 139).

II.

The Illinois Fugitives From Justice Act Is Not Unconstitutional.

Petitioners advance as grounds for the granting of petition that the Illinois Fugitives From Justice Act is in conflict to Article IV, Section II, Clause 2 of the Constitution of the United States for the reason that it provides for a judicial determination of four propositions when opposing extradition, namely:

> (1) That the requisition and papers are not in regular and legal form;
>
> (2) That he is not the particular person named in the requisition, indictment or affidavit or in the warrant issued by the Governor;
>
> (3) That he is not substantially charged with a crime against the laws of the demanding state; or
>
> (4) That he is not a fugitive from justice of the demanding state, *i.e.*, that he was not physically present in the demanding state on or about the date upon which the offense with which he is charged is alleged to have been committed. (Ill. Rev. Stat. 1953, ch. 60, par. 2.)

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This section provides, upon the filing of an affidavit setting out any one or more of said allegations, a writ of habeas corpus shall issue and a hearing held. By these provisions Illinois provides judicial safeguards of the essentials for extradition as promulgated by this court. (*Hyatt* v. *Corkran,* 188 U. S. 691; *Appleyard* v. *Massachusetts,* 203 U. S. 222, 230; *McNichols* v. *Pease,* 207 U. S. 100, 108).

III.

Erroneous Rulings Upon Evidence Do Not Achieve the Dignity of a Constitutional Question.

Petitioners complain of the trial court's rulings in limiting evidence. They assert they should have been permitted to introduce testimony of the manner and means by which petitioners were alleged to have committed the crime of "larceny by trick" in Ohio. The evidence offered was of business transactions out of which the crime allegedly arose. (Abst., Ill. Sup. Ct., pp. 7-14.) To permit an examination of such issues would, in effect, result in a determination of guilt or innocence by a court of the asylum state. To do so would usurp the prerogative of the courts of the demanding state. (*Biddinger* v. *Commissioner of Police,* 245 U. S. 128, 135).

There was direct testimony that both of the petitioners were *physically present* in Cleveland, Ohio on April 7, 1950, the date alleged in the indictment. (Abst., Ill. Sup. Ct., pp. 6, 10.) Petitioners denied that they were in Cleveland on the date alleged. (Abst. 11, 12.) The trial court placed credence in the testimony of the witnesses from Ohio and apparently disbelieved that of petitioners. This finding of the trial court is not open to review simply because the evidence of presence in the demanding state is

sharply in conflict. Even if erroneous, the question is not one of constitutional moment.

IV.

The Illinois Decision Is Not in Conflict With the Most Nearly Applicable Decisions of This Court.

Petitioners assert that the opinion of the Supreme Court of Illinois is in conflict with *Hyatt* v. *Corkran*, 188 U. S. 691 and that it ignores the holding of this court in *Strassheim* v. *Daily*, 221 U. S. 280. Petitioners also refer to the case of *People* v. *Enright*, 217 N. Y. Supp. 288.

In discussing the *Enright* case, petitioners' counsel inadvertently say that the *Enright* case and the instant case present "a conflict between the highest courts of two States". The *Enright* case was a decision by the Appellate Division of the Supreme Court of the State of New York. Apparently petitioners' counsel are unaware that despite its appellation as "Supreme", the Supreme Court of New York is not that state's court of last resort but is in its trial division New York's circuit, district or other *nisi prius* court and in its appellate division is that State's intermediate court of appeal. The court of last resort in New York is of course the New York Court of Appeals. Hence there is no "conflict between the highest courts of two States" presented.

In the instant case there was direct, though conflicting evidence, that petitioners were physically present in the State of Ohio at the time alleged in the warrant. In the case of *Hyatt* v. *Corkran* it was conceded that the relator was not within the State of Tennessee at the time of the alleged crimes. (p. 694.)

The *Strassheim* case, if it be assumed that petitioners were not physically present in the demanding state at the

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time charged, affords little comfort to petitioners. That case is authority for the proposition that if one commits an overt act while in the demanding state, which is intended to be a material step toward accomplishing the crime, and then absents himself, he becomes a fugitive from justice.

Conclusion.

For the foregoing reasons respondent prays that the writ be denied.

Respectfully submitted,

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